

In a case under section 292(a) of the Penal Code knowledge that the publication is obscene need not be proved. The difficulty of obtaining legal evidence of the offender's knowledge of the obscenity of the publication has made the liability strict. Absence of knowledge may only be taken in mitigation of sentence.

A publication is an obscene publication if only a part of it is obscene.

Identification is a fact or circumstance which must be proved against an accused person before it can be relied upon and used against him. A fact or circumstance is held to be proved only when it fulfils the definition of the word "proved" given in section 3 of the Evidence Ordinance. The evidence of identification is as much subject to this definition as any other kind of evidence but in assessing the evidence of identification the trial court does not apply the tests provided in this section. It is true that an absolute certainty is not required but the court has to test the evidence with prudence and accept it only when it is so highly probable that its truth can safely be accepted. The test excluded from its orbit blind faith of a true believer, because prudence and credulity do not go together.

Case referred to:-

- (1) *Ranjit D. Udeshi v. State of Maharashtra* A.I.R. 1962 Bombay 268; on appeal A.I.R. 1965 S.C. 881.

MAGISTRATE'S CRIMINAL APPEAL.

R. Ponnudurai for the appellant.

Hashim bin Abdul Majid (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah J.: The appellant was convicted for an offence under section 292(a) of the Penal Code viz., publicly exhibiting for sale an obscene book, to wit one copy of *Majallah Filem Malaysia*, October 1969 issue. He was fined \$60/- in default 2 weeks imprisonment. I dismissed the appeal against conviction and intimated that I would give my reasons later. I now proceed to do so.

Majallah Filem Malaysia is an approved publication but an article appearing in it offends against the recognised standards of propriety and is therefore obscene. That is not challenged.

One of the grounds of appeal is that the publication is an approved publication by the Government and therefore not an obscene publication. Counsel's argument is that a publication which contains an obscene article is not obscene because it is an approved publication. I think there is a fallacy in the argument. In my view the word "approved", strong as it is, cannot be read without any qualification. It does not mean *extra legem*. We boast of being a free democratic country but that does not mean that we are not subject to law. The impugned article is clearly obscene and a publication is an obscene publication even if only a part of it is obscene (see *Ranjit D. Udeshi v. State of Maharashtra*).⁽¹⁾

The conviction is impugned on another ground that the appellant has no knowledge that the publication is obscene as he is only a retailer and therefore not expected to know what is contained in every publication. The argument is based on the false premise that before a person is found guilty of selling or keeping for sale any obscene publication, the prosecution must prove that he "knows" that the publication is obscene. In a case under section 292(a) of the Penal Code know-

ledge that the publication is obscene need not be proved. If the law is otherwise it would place an intolerable burden on the prosecution. The difficulty of obtaining legal evidence of the offender's knowledge of the obscenity of the publication has made the liability strict. Absence of knowledge may only be taken in mitigation of sentence.

A third ground of appeal is that the learned magistrate had failed to direct his mind as to the identification of the appellant. The evidence shows that the police constable (P.W. 1) who raided the shop saw the impugned publication displayed for sale but when giving evidence in court he had failed to identify the accused. The investigation officer (P.W. 3) in his testimony said that in the course of investigation he went to the said shop where he saw the accused and that he checked the business license, which he produced as Exhibit P. 3. The said license discloses the name of the accused.

Identification is a fact or circumstance which must be proved against an accused person before it can be relied upon and used against him. A fact or circumstance is held to be proved only when it fulfils the definition of the word "proved" given in section 3 of the Evidence Ordinance. The evidence of identification is as much subject to this definition as any other kind of evidence but it would appear to me that in assessing the evidence of identification the trial court does not apply the tests provided in this section. It is true that an absolute certainty is not required but the court has to test the evidence with prudence and accept it only when it is so highly probable that its truth can safely be accepted. The test excludes from its orbit blind faith of a true believer, because prudence and credulity do not go together.

In my view and so is the view of the lower court the evidence of identification has fulfilled this test. There is sufficient evidence to establish the accused's identity.

Appeal dismissed

YAP CHOO HOO v. TAHIR BIN YASIN & ANOR.

[O.C.J. (Sharma J.) July 9, 1970]

[Malacca — Civil Suit No. 185 of 1967]

Evidence — Documents — Agreed bundle — Whether document forming part of, automatically stands proved both as to its existence, due execution and contents without having to be in any way or manner proved — Evidence Ordinance, 1950, s. 3 — Practice Notes.

Practice and Procedure — Agreed bundle of documents — Practice note cannot override provisions of Evidence Ordinance, 1950.

In this case the plaintiff had put in an agreed bundle consisting of seven documents. Counsel for the defendants maintained that once a document forms part of an agreed

bundle of documents. It stands automatically proved as to its existence, due execution and contents without having to be in any way or manner proved and that no evidence need or has to be produced even to formally put in the document in question. Counsel for the plaintiff maintained otherwise.

Held: a document even forming part of the agreed bundle of documents has got to be proved, although it need not be formally and strictly proved.

Per Sharma J.: "I am not prepared to subscribe to the view that once a document forms part of the agreed bundle of documents it automatically proves itself without any formal production of the original or a copy thereof and without any witness tendering it or producing it in court. If it were not so, it would be against all conceptions of justice as the result of it would be that one of the parties would be deprived of the right to cross-examine a witness who would otherwise be required to produce the document even though formally."

Case referred to:-

(1) *Henry Trading Co. Ltd. v. Harun* [1966] 2 M.L.J. 281.

CIVIL SUIT.

A. C. Vohrah for the plaintiff.

Abdullah bin Ngah (Senior Federal Counsel) for the defendants.

Sharma J. (delivering oral ruling): An agreed bundle consisting of seven documents was put in by the plaintiff this morning and marked A. The learned senior federal counsel maintains that once a document forms part of an agreed bundle of documents it stands automatically proved both as to its existence, due execution and contents without having to be in any way or manner proved and that no evidence need or has to be produced even to formally put in the document in question. Mr. Vohrah maintains otherwise.

The matter does not seem to me to be free of difficulty. "Proof" is defined under section 3 of the Evidence Ordinance in the following terms:—

"A fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

When it is said that the court believes a fact to exist it is the same thing as saying that the court is satisfied of it being in existence. Absolute certainty is not possible in the affairs of life and degrees of probability short of absolute certainty have to be considered. The extent of proof required is that of a prudent man. The test in each case is would a prudent man, after considering the matters before him (which vary with each case) deem the fact in issue to be proved or disproved. If the contention of the learned senior federal counsel is correct, the court has not got to go into the question of the probabilities or the certainty of a fact being in existence because the argument put forward is that a document which forms part of the agreed bundle of documents needs no further proof in any form whatsoever and is to be treated by the court as fully proved and established.

It was suggested by the learned senior federal counsel that if the plaintiff wished to prove that any document or part of any document which has found

A its place in the agreed bundle of documents is not true, the plaintiff should adduce evidence to show the falsity of such a document or part of such a document and that the burden of proving this in such circumstances rests upon the plaintiff. I may at this stage say that there is a distinction between the burden of proof and the proof itself. Once a fact or a document is proved (and this applies with greater force when the contents of a document required to be in writing are concerned) the court has got to accept it as such.

My attention was drawn to the case of *Henry Trading Co. Ltd. v. Harun*⁽¹⁾ where it has been said:

"The other statement of law made by the learned trial judge on which I feel I should comment is that part of the judgment wherein he said that the contents of an agreed bundle of documents must be proved unless such contents are admitted by the other side. With respect, I say that where there is an agreed bundle of documents there is no need to prove these documents. This rule is too well established in law to be doubted."

That was a road accident case in which the learned judge relying on and preferring the evidence of the sergeant allowed the appeal. The other two judges constituting the Federal Court concurred. It is not apparent that they also concurred in the observation quoted above that a document forming part of an agreed bundle of documents need not be proved. I must respectfully confess my ignorance of the case law establishing that proposition. I have up to now, perhaps in ignorance, thought that the sole object of preparing an agreed bundle of documents was that such a bundle was prepared under a practice note for the convenience of the court and the parties. Such a practice note, however, could not override the provisions of the Evidence Ordinance. Parties may have in their possession or power innumerable documents disclosed in their respective affidavits of documents and it may happen that some or most of such documents the counsel for the parties may decide not to produce at all. Such documents are thus left out. The plaintiff may like to produce some documents and the defendant some. If they agree that all the documents desired to be produced by them should go into an agreed bundle of documents, such a bundle is prepared. My own view is that an agreed bundle of documents is not the same thing as a bundle of admitted documents. Counsel can again for the convenience of the court and for the purpose of saving costs admit certain documents and prepare a bundle of admitted documents. A situation might arise where for example the plaintiff's counsel wishes to produce certain documents but the defendant's counsel objects to their production. Such documents should go into a bundle of documents not agreed upon.

I say this with all diffidence and with the greatest respect to the decision of the Federal Court in *Henry Trading Co. Ltd. v. Harun*.⁽¹⁾ I may be wrong but as I read the judgment, the observation regarding the effect of inclusion of a document in the agreed bundle of documents was only made in passing by a single judge and that observation did not form the basis of the decision of the Federal Court. If I am wrong in my reading of that judgment, I have of course to subordinate my views to the views expressed by the highest tribunal in this land.

Practice Note No. 1 of 1948 ([1948] M.L.J. xiv) reads as follows:

"In civil suits in the Supreme Court where an advocate and solicitor is engaged on either side, it is his duty to assist the court by presenting documentary evidence in the most convenient possible manner. In most cases it is possible to agree the majority of documents which will be required in evidence. (The underlining is mine.) In every such case they should be so agreed and copies should then be typed and made up in a proper bundle bound and paged in order of date. In all cases where documents cannot be agreed copies must be available and can conveniently be bound and paged in another bundle. As regards agreed documents, the court need not be troubled to see the originals at all. As regards disputed documents, it will be necessary to prove or attempt to prove them; but the court should be given a copy for the judge's use and a copy for the file and all counsel should for convenience be furnished with copies in the same format. The expenses of such copies of relevant documents can properly be allowed on taxation. If the steps outlined above are not taken, much time is wasted and great inconvenience ensues..."

The bundle agreed upon, in the language of the practice note, is to consist of the documents which will be required in evidence. There may be documents the parties may have in connection with the suit and which they may not intend to produce at all. The practice note also contemplates a bundle of disputed documents. Both the bundles are made for the convenience of the court and the parties to facilitate a speedy trial. All that the practice note says is that if a document forms part of the agreed bundle of documents the court need not be shown the original of it at all. This is so because the parties having seen the original and having agreed to include it in the agreed bundle for the convenience of the court need not produce it to the court. The practice note does not say that the original has not got to be produced or proved. I have already said that there is a clear distinction between a document which is admitted either under the provisions of the Rules of the Supreme Court or under the provisions of the Evidence Ordinance and a document which only forms part of the agreed bundle of documents (as prescribed under the practice note).

It may perhaps be more convenient if a bundle of admitted documents is made and there is another

A bundle which contains the remaining documents which the parties require or wish to be produced at the trial. My own view is that a document even forming part of the agreed bundle of documents has got to be proved, although it need not be formally and strictly proved.

I am not prepared to subscribe to the view that once a document forms part of the agreed bundle of documents it automatically proves itself without any formal production of the original or a copy thereof and without any witness tendering it or producing it in court. If it were not so, it would be against all concepts of justice as the result of it would be that one of the parties would be deprived of the right to cross-examine a witness who would otherwise be required to produce the document even though formally.

It was argued that the counsel should have been careful before agreeing to have the document included in the agreed bundle of documents. Mr. Vohrah has told me that if he was aware of the interpretation put by the senior federal counsel on the import, meaning and significance of the agreed bundle of documents, he would not have agreed to have the documents A8-9 and A10-12 included in the agreed bundle and that he had agreed to do so only under a mistake or error because his views were contrary to the views now expressed by the learned senior federal counsel. The idea of a trial is to ensure justice and fairplay. Having regard to the interests of the parties and the higher interests of a fair trial, I will exclude documents A8-9 and A10-12 from the agreed bundle of documents and those documents will have to be formally proved.

My attention was also drawn to practice note No. 1 of 1969 ([1969] 1 M.L.J. xii) which relates to suits for damages in road accident cases. That practice note, however, is not of much assistance as it says nothing about the significance or the meaning of "agreed bundle of documents."

Order accordingly.

Solicitors: *Murphy & Dunbar.*